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IN THE

Supreme Court of the United States

October Term, 1965

No. 550

MARIO PREZIOSO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner, Mario Prezioso, prays that this court grant rehearing of its order of December 6, 1965, denying the petition for a writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit in the above entitled case as prayed for in the petition filed herein.

Reasons for Granting Rehearing and Issuing the Writ

A substantial ground available to petitioner was not presented on the previous petition filed herein for the writ. The substantial ground is one affecting the construction of the Constitution insofar as it relates to Congress's control over interstate commerce. The evidence in this case as appears by the record and in the other papers filed in this

proceeding show that Prezioso, while a margin clerk in a securities house in the City of New York, stole securities at the behest of Zochowski, who was an F.B.I. informer. The evidence in the record shows that Prezioso did not participate in any scheme or conspiracy to *transport* the securities in interstate commerce nor to cause them to be so transported. All he did was to steal the securities and to turn them over to Zochowski. So far as Prezioso is concerned, the transaction was complete in the City of New York at the time the theft occurred.

The question therefore is one that goes to the heart of the jurisdiction of the District Court. The question is: may a construction be placed on 18 U.S.C. 2314 and 18 U.S.C. 371 and 2 so as to draw within its ambit activities within a state which so far as the accused is concerned was complete as to him within the state. In other words, is it the rule as stated in *United States* v. *Tannuzzo,* 174 F. 2d 177, that the statute is satisfied if there is proof only that the goods eventually found its way into interstate commerce through the efforts of persons other than the original thief? In that case, the court ruled that it did because the thief "caused" the entry into interstate commerce?

This court in *Pereira* v. *United States,* 347 U.S. 1, in a converse situation held that if the thief had reason to believe that the stolen item would find its way into interstate commerce then the statute applies. In that case a check drawn on a foreign bank was involved and the court assumed that the accused would have reason to believe that the mails and interstate facilities would have been used in having the check cleared. Here, however, securities are involved consisting of bonds and stock and a different

situation is presented. How far can the assumption be stretched so as to impute knoweldge and intent to the thief that the stolen item would find its way into interstate commerce.

There is nothing in the record to show that Prezioso participated in a plan or conspiracy to use interstate media for the disposal of securities. The only evidence points to the limited act of stealing in the City. And the evidence excludes any possible other evidence of participation in a scheme or abetment for a disposal in interstate commerce.

Consequently, the District Court should have granted the application made by Prezioso *before sentence* to withdraw his plea, so as to afford him the opportunity to challenge the jurisdiction of the District Court. The failure to do so has resulted and will result in a denial of a fundamental constitutional right to question the jurisdiction over the prosecution.

CONCLUSION

For the reasons set forth above and in the petition for a writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Second Circuit.

Respectfully submitted,

EMANUEL REDFIELD
Counsel for Petitioner

Certificate of Counsel

I HEREBY CERTIFY that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Dated: December 28, 1965.

EMANUEL REDFIELD
Counsel for Petitioner